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In the Supreme Court of the United States

OCTOBER TERM, 1986

WILLIAM G. LACHANCE AND WILLIAM F. ZIMMERLI,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

RANGELEY WALLACE
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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QUESTION PRESENTED

Whether petitioners established that the grand jurors were not drawn from a source representing a fair cross section of the community.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A3-A62) is reported at 788 F.2d 856. The order of the district court (Pet. App. A66-A67) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 14, 1986. A petition for rehearing was denied on May 15, 1986. The petition for a writ of certiorari was filed on July 14, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners were indicted in the United States District Court for the District of Connecticut on charges relating to marijuana importation and distribution, in violation of 21

U.S.C. 841(a)(1), 846, 848, 952 and 963. Following the district court's denial of petitioners' motion to dismiss the indictment, petitioner LaChance pleaded guilty to five counts, reserving his right to appeal the denial of the motion to dismiss. Following a jury trial, petitioner Zimmerli was convicted on 16 counts. Petitioner LaChance was sentenced to a total of ten years' imprisonment and a $60,000 fine. Petitioner Zimmerli was sentenced to a total of 18 years' imprisonment and fined $410,000.

1. Petitioners were indicted in the Bridgeport Division of the District of Connecticut in September 1983; a superseding indictment was returned by the same grand jury in March 1984. Under the District's Plan for Random Selection of Grand Jurors Pursuant to the Jury Selection and Service Act of 1968, grand jurors in the Bridgeport Division are chosen from the Fairfield County voter registration list. One percent of the names on this source list are then selected at random to make up the so-called "master wheel" or venire. The master wheel is emptied and refilled once every four years; at the time of petitioners' indictment, it last had been filled in 1981 and, before that, in 1977. Pet. App. A12-A13.

Periodically, names are chosen at random from the master wheel. The persons selected are sent a juror qualification form. If these persons are not exempted from service, their names are then placed in the "qualified wheel." The names of the persons serving on grand juries are drawn randomly from the qualified wheel. Thus, the grand jury that returned the indictment against petitioners in September 1983 ultimately was drawn from a master wheel created in 1981. Pet. App. A13-A15.

2. On September 14, 1983, petitioner LaChance was found in possession of 4300 pounds of marijuana on a sailing vessel in Long Island Sound. His arrest ultimately

led to the indictment of 36 persons, including petitioner Zimmerli, for conspiring to import marijuana into the United States. Pet. App. A5-A6.

On February 2, 1984, petitioners moved to dismiss the indictment on the basis of alleged discrimination in the selection of grand jurors (Pet. App. A68-A102). In relevant part, the motion asserted that blacks and women were substantially underrepresented on Bridgeport Division grand juries; it accordingly alleged that grand juries in the Division did not represent a fair cross section of the community, as required by the Sixth Amendment and the Jury Selection and Service Act, 28 U.S.C. 1867. In particular, petitioners stated that, while 6.98% of the voting age population of the District of Connecticut was black,[1] only 3.52% of the persons listed on the combined 1977 and 1981 master wheels—and only 4.83% of those listed on the combined 1977 and 1981 qualified wheels—were black (Pet. App. A71-A72). Similarly, petitioners argued that women constituted 53.17% of the voting age population of Connecticut, while only 48.91% of the persons on the combined 1977 and 1981 qualified wheels were women (*id.* at A73).[2] Petitioners argued that these disparities exceeded several standard deviations and therefore were statistically significant (*id.* at A79-A83).

On May 2, 1984, the district court denied the motion to dismiss without a hearing "for lack of a sufficient showing" (Pet. App. A64). The district court subsequently explained that, " 'applying the statistical analysis used by the Second Circuit in *United States* v. *Jenkins*, 496 F.2d 57, 65-66

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[1]The court of appeals found that the stated percentage actually represented the number of blacks in Fairfield County, rather than the number in Connecticut as a whole (Pet. App. A26).

[2]The court of appeals found that the 53.17% figure in fact applied to the number of women in Fairfield County (Pet. App. A27).

BEST AVA

(1974), cert. denied, 420 U.S. 925 (1975), the [petitioners] had failed to make an adequate showing on their claims of discrimination' " (Pet. App. A11).[3]

3. The court of appeals affirmed (Pet. App. A3-A62), rejecting petitioners' assertion that the district court erred in denying their motion to dismiss without the benefit of a hearing. Looking to *Duren* v. *Missouri*, 439 U.S. 357, 363 (1979), the court of appeals explained (Pet. App. A17) that a defendant can make out a claim under the Sixth Amendment or the Jury Selection Act that grand jurors have been chosen from a pool that is not representative of the community by showing:

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process.

The court found the first prong of this test satisfied, acknowledging that blacks and women are distinctive groups within the meaning of *Duren* (Pet. App. A18-A19).

The court held, however, that petitioners had failed to make the requisite showing under the second prong of the Duren test. Under *Duren*, the court explained, petitioners were obligated to establish a disparity between the percentage of blacks and women in the community, and the proportion of blacks and women in the 1981 master and qualified wheels from which the indicting grand jury was chosen

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[3]The district court also rejected petitioners' claims of discrimination in the selection of petit jurors and in the selection of women to be grand jury forepersons. Those claims are not repeated here.

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(Pet. App. A27-A29). Once such a disparity was established, its significance could be judged under either petitioners' standard deviation analysis (see *id.* at A23-A25) or under the so-called "absolute numbers" approach (see *id.* at A20-A22).[4] But the court emphasized that this disparity, to be meaningful, had to involve figures relating to the 1981 master and qualified wheels: petitioners "would not be entitled to any relief based solely on claimed underrepresentations in the 1977 venire and qualified wheel" (*id.* at A28).

Here, petitioners failed to establish that disparity. Their presentation *combined* the data from the 1977 and 1981 master and qualified wheels. The combination of outdated (and hence irrelevant) figures from 1977 with relevant data from 1981, the court of appeals held, "prevented the [district court], and now prevents us, from determining the degree of underrepresentation on the 1981 venire or qualified wheel" (Pet. App. A28). While petitioners "through extensive discovery * * * had available to them the data to make a meaningful statistical presentation" (*id.* at A29), the court of appeals found no value in "the number of standard deviations claimed by [petitioners] for the 1977 and 1981 data taken together" (*ibid.*).

The court of appeals accordingly concluded that petitioners had "not stated facts as to the 1981 sources, from which the grand jury which indicted [them] was derived, so as to enable us or the court below to apply *either* the

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[4]Under this approach, a court determines how many members of the underrepresented group would be expected to appear on the jury panel if the panel mirrored the racial or sexual makeup of the population. The court next calculates how many members of the group would appear on the jury if the percentage of the master or qualified wheel made up by members of the group were reflected on the panel. "A successful challenge to selection procedures depends on whether the difference between the numbers determined in the two steps is 'substantial.' " Pet. App. A21.

'absolute numbers' analysis * * * or the 'standard deviation' analysis" (Pet. App. A25 (emphasis in original)). In these circumstances, the court of appeals held that petitioners had not made a sufficient showing of discrimination to justify an evidentiary hearing (*ibid*; see *id.* at A30). The court therefore found it unnecessary to decide whether petitioners' standard deviation analysis might appropriately be used to resolve a claim under the Sixth Amendment or the Jury Selection Act on another record.

ARGUMENT

Petitioners principally contend that their data establishes that the indicting grand jury was not drawn from a fair cross section of the community, and that the court of appeals' holding to the contrary conflicts with decisions of this Court and of the other courts of appeals. This contention is entirely without merit and does not warrant further review.

1. The court of appeals rejected petitioners' claim because it found their data to be flawed. The Sixth Amendment and the Jury Selection Act guarantee that grand and petit juries will be "drawn from a source" that is fairly representative of the community. *Taylor* v. *Louisiana*, 419 U.S. 522, 538 (1975). Here, petitioners were indicted by a grand jury chosen from master and qualified wheels that were compiled in 1981. Petitioners accordingly were obligated to show that the makeup of the 1981 jury wheels—the "source" from which the grand jury was chosen—was not representative of the community. At least in part, however, petitioners' data related to the *1977* jury wheels. As the court of appeals noted (Pet. App. A28), this sort of outdated data might be relevant to the third prong of the *Duren* test, which looks to whether the underrepresentation of a given group is attributable to systematic exclusion of that group from the juror selection process. See 439 U.S. at 364. But data from a jury wheel that has since been dissolved cannot establish that the *current* source of Bridgeport grand jurors is unrepresentative.

In challenging this analysis, petitioners repeatedly suggest (Pet. 27, 32, 34, 35) that the court of appeals required them to establish underrepresentation on the particular grand jury that indicted them. But the court did nothing of the sort. Instead, it indicated that the relevant data concerned "underrepresentation in the 1981 venire [or master wheel] and qualified wheel" (Pet. App. A29), the *sources* of the indicting grand jury. Petitioners thus were free to present data from other grand juries empaneled since 1981, or from the 1981 voting role, master wheel, or qualified wheel. It is data of that sort that have been found relevant in fair-cross-section cases both by this Court and by the other courts of appeals, which have indicated that defendants "may challenge only improprieties affecting the *particular* grand jury which indicted them." *United States* v. *Bearden*, 659 F.2d 590, 601 (5th Cir. 1981) (emphasis in original), cert. denied, 456 U.S. 936 (1982). See *Duren*, 439 U.S. at 361-363 (fair representation claim based on data from the jury wheel in use during the year preceding trial); *Taylor*, 419 U.S. at 524 (data related to wheel from which jury was drawn).[5]

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[5]Petitioners rely (Pet. 31, 41-42) on several decisions of the courts of appeals. None, however, stands for the proposition that outdated jury selection data may be used to establish a fair-cross-section claim. *United States* v. *Miller*, 771 F.2d 1219 (9th Cir. 1985), holds only that the makeup of the individual grand jury that indicted the defendants, and of the 88-person venire from which the jury was chosen, is irrelevant; the defendants there presented no data about the jury wheel. (In contrast to the court below, the *Miller* court used the term "venire" to refer to the individual panel from which the jury was chosen.) Other cases cited by petitioners in fact considered the composition of the wheel or traverse list from which the jury was selected, as did the court in this case. See *United States* v. *Hafen*, 726 F.2d 21, 22-23 (1st Cir.), cert. denied, 466 U.S. 962 (1984); *Machetti* v. *Linahan*, 679 F.2d 236, 238 (11th Cir.), cert. denied, 459 U.S. 1127 (1982); *United States* v. *Clifford*, 640 F.2d 150, 154 (8th Cir. 1981); *United States* v. *Test*, 550 F.2d 577, 581 (10th Cir. 1976). *Moultrie* v. *Martin*, 690 F.2d 1078 (4th Cir. 1982), involved an equal protection claim which, in contrast to a fair representation claim under the Sixth Amendment or the Jury Selection Act, turns on the intent of government officials. See generally *Duren*, 439 U.S. at 368 n.26.

2. Because the court of appeals properly held that petitioners' data cannot support a Sixth Amendment fair-cross-section claim under any theory, this case does not present the question (see Pet. 46-50) whether petitioners were correct in their assertion that statistical decision theory may be used to analyze such claims. It may be noted, however, that petitioners' claim of a conflict in the circuits on the point (*id.* at 49-50) is spurious. The cases cited by petitioners as approving the use of statistical decision theory all involved equal protection claims, rather than fair-cross-section claims arising under the Sixth Amendment or the Jury Selection Act. In resolving the latter category of claims, the courts of appeals uniformly have eschewed statistical decision theory and looked to the absolute difference between the percentage of persons in the juror pool and the percentage of persons in the community that are members of the assertedly underrepresented group. See *United States* v. *Rodriguez*, 776 F.2d 1509 (11th Cir. 1985); *United States* v. *Gometz*, 730 F.2d 475 (7th Cir. 1984), cert. denied, No. 85-622, (Apr. 21, 1986); *United States* v. *Hafen*, 726 F.2d 21 (1st Cir.), cert. denied, 466 U.S. 962 (1984); *United States* v. *Yazzie*, 660 F.2d 422, 426 (10th Cir. 1981), cert. denied, 455 U.S. 923 (1982); *United States* v. *Clifford*, 640 F.2d 150 (8th Cir. 1981); *United States* v. *Armstrong*, 621 F.2d 951, 956 (9th Cir. 1980); *United States* v. *Butler*, 611 F.2d 1066 (5th Cir.), cert. denied, 447 U.S. 921 (1980).[6]

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[6]Under that test, petitioners' data—even if relevant—would not make out a prima facie claim under the Act or the Sixth Amendment. Their data reveal an absolute disparity for blacks of 2.15% (looking to the master wheel) and 3.46% (looking to the qualified wheel), and an absolute disparity for women of 4.62%. The courts of appeals uniformly have held disparities of that magnitude inadequate to state a claim. See, *e.g.*, *Rodriguez*, 776 F.2d at 1509; *Yazzie*, 660 F.2d at 426; *Armstrong*, 621 F.2d at 956; *Hafen*, 726 F.2d at 23; *Butler*, 611 F.2d at 1070. The decisions in these cases are consistent with the decision of this Court in *Swain* v. *Alabama*, 380 U.S. 202, 209 (1965), where the Court held that an absolute disparity of less then 10% for an identifiable group is insufficient to establish a Fourteenth Amendment violation. That aspect of *Swain* was not involved in this Court's recent reconsideration of preemptory challenges in *Batson* v. *Kentucky*, No. 84-6263 (Apr. 30, 1986).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

RANGELEY WALLACE
Attorney

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